1982

Gardiner & Gardiner Builders et al v. Reid Swapp and Tanglewood SLC Associates : Reply Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

GARDINER & GARDINER BUILDERS, et al.,

Plaintiffs,

vs.

REID SWAPP, a/k/a REID SWAPP CONSTRUCTION COMPANY, GARY C. BANKS, LAWRENCE C. POTTER, JOSEPH M. FRIEDHEIM, and TANGLEWOOD SLC ASSOCIATES, LTD.,

Defendants.

Civil No. C-80-4429

Appeal No. 18-079

REID SWAPP,

Crossclaimant-Appellant,

vs.

TANGLEWOOD SLC ASSOCIATES, LTD.,

Crossclaimant-Respondent.

REPLY BRIEF OF CROSSCLAIMANT-APPELLANT REID SWAPP

AN APPEAL FROM THE FINAL ORDER ISSUED BY THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE G. HAL TAYLOR, DISTRICT JUDGE, PRESIDING.

PAUL JAMES TOSCANO, P.C.
JACKMAN & ASSOCIATES
1325 South 800 East
Suite 300
Orem, utah 84057
Attorneys for Reid Swapp,
Crossclaimant-Appellant.

PATRICIA M. LEITH and
JOHN A. SNOW
VAN COTT, BAGLEY, CORNWALL & McCARTHY
Suite 1600, 50 South Main St.
Salt Lake City, Utah 84144
Attorneys for Tanglewood SLC Associates, Ltd.,
Crossclaimant-Respondent.

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& McCARTHY
Suite 1600, 50 South Main St.
Salt Lake City, Utah 84144
Attorneys for Tanglewood SLC
Associates, Ltd.,
Crossclaimant-Respondent.

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CLARIFICATION OF FACTS

In its Brief, Respondent Tanglewood SLC Associates, Ltd. fails to note that on October 1, 1980, Swapp filed answers to the Plaintiffs' First Set of Interrogatories (Record, page 75), which is probative of the fact that Swapp responded to discovery in the period prior to his abandonment by his former attorney, who unofficially withdrew from this case.

Further, Swapp has testified, by uncontroverted Affidavit, that he was never contacted by his former attorney with regard to the Respondent's discovery requests filed after April 2, 1981, and that Swapp had no knowledge of the existence or significance of the following documents:

(1) The Interrogatories of Plaintiff Ritchie (Record, page 192);

(2) The Request for Documents of Plaintiff Ritchie (Record, page 195);

(3) The Interrogatories of Defendant Tanglewood (Record, page 207);

(4) The Request for Documents of Defendant Tanglewood (Record, page 204);

(5) The Notice of Deposition by Defendant Tanglewood (Record, page 230);

(6) The Amended Notice of Deposition by Defendant Tanglewood (Record, page 234);

(7) The Stipulation regarding future discovery by Defendant Tanglewood (Record, page 247);

(8) The Motion to Compel Discovery by Defendant Tanglewood (Record, page 256);

(9) The Order granting the Motion to Compel (Record, page 267);

(10) The Default Certificate against Swapp filed by Tanglewood (Record, page 271);

(11) The Motion to Strike Swapp's pleadings by Tanglewood (Record, page 276);

(12) The Order striking Swapp's pleadings (Record, page 272);

(13) The Default Judgment against Swapp by Tanglewood (Record, page 279);

(14) The Order in Supplemental Proceedings of July 10, 1981 (Record, page 283);

(15) The Settlement Stipulation between the other parties (Record, page 285);

(16) The Order in Supplemental Proceedings of August 13, 1982 (Record, page 288).

Furthermore, it is clear from the record that the Order in Supplemental Proceedings dated July 9th/10th, 1981 (Record, pages 283 and 288) was never served on Swapp, and that therefore it is without legal significance and effect. Moreover, the Order in Supplemental Proceedings signed October 14, 1981 and filed with the Court on September 3, 1981 (Record, page 290) was served at the residence of Swapp upon his son

(Record, page 292) at a time when Swapp was still under the impression that he was being represented by his attorney.

By way of further clarification, Swapp draws the attention of the Court to the fact that the Respondent, in its answering brief, suggests that Swapp was dilatory in bringing his Motion to Set Aside the Default Certificate and Default Judgment. The record, however, shows the contrary. The first service of a post-judgment writ or order made upon Swapp personally was an Order to Show Cause and some execution papers, served upon him on September 22, 1981 (Record, pages 294, 296, and 321). Within ten days after this service, Swapp apprised himself of the fact that he had been abandoned by his former attorney and sought the assistance of new counsel. New counsel appeared with Swapp at the Order to Show Cause hearing (Record, page 294) held on October 2, 1981. Only nine days elapsed between September 22, 1981 (when Swapp was first personally served with an Order to Show Cause and some execution papers) and October 1, 1981 (when Swapp retained new counsel). Within that nine day period, Swapp acted with dispatch in obtaining counsel and in bringing his Motion to Set Aside the Default Certificate and the Default Judgment.

Furthermore, Respondent mischaracterizes Swapp's brief. Swapp never said in his brief (page 5) that he "first became

aware of the judgment on October 1, 1981, when an execution was served" (see Tanglewood's answering brief, page 4). What Swapp stated was, "Swapp first became aware of his dilemma on or about October 1, 1981, only after receiving execution papers on his wife's real property" (see Swapp's brief, page 5). Swapp had never been told of his status as a judgment debtor and had assumed he was being represented in the lawsuit by his former attorney, Steven D. Luster. Swapp, therefore, assumed that copies of the papers served upon him (which papers he did not understand) were also being served upon his lawyer whom Swapp thought was representing him and taking care of these matters. Swapp never understood his "dilemma" (i.e., that he was not being represented, that he had been abandoned, and that he was responsible personally for answering the orders being served upon him) until on or about October 1, 1981.

The Record on Appeal and the Affidavit of Swapp, filed in support of his Motion to Set Aside the Default and Default Judgment (Record, pages 302, 304 and 306) support this interpretation of the facts.

REBUTTAL ARGUMENTS

In spite of Respondent's assertions to the contrary, the abuse of discretion of the trial court in this case is clearly shown by the transcript of the hearing on Swapp's Motion to Set Aside the Default and Default Judgment and the hearing on the Motion to Vacate and Quash the Execution (Record,

page 333). The transcript of that hearing shows that, though the Court clearly stated its reasons for denying the plaintiff's Motion to Vacate and Quash the Execution, the Court did not clearly state its grounds for denying Swapp's Motion to Set Aside the Default and Default Judgment, which Motion had been made pursuant to Rule 60(b)(7), inter alia, of the Utah Rules of Civil Procedure.

The whole question in this case is whether or not the kind of abandonment or unofficial withdrawal by an attorney that occurred in this case comes under Rule 60(b)(1) as "negligence" imputable to the client and the remedy for which is a Motion To Set Aside to be made within three months from the entry of judgment, or whether it is "negligence" which constitutes "any other reason justifying relief from the operation of the judgment" under Rule 60(b)(7) which would not be imputable to the client and the remedy for which is a Motion To Set Aside to be made within a reasonable time of the entry of judgment (as opposed to within three months). The transcript of the hearing (Record, page 333) indicates that the trial court did not make this distinction in stating its reasons for denying Swapp's motion to set aside, nor did it address itself to the "reasonable time" language of Rule 60(b)(7).

Respondent argues that Swapp's former attorney committed Rule 60(b)(1) "negligence," and suggests that any other finding would result in an evisceration of the three-month time limit

governing motions to set aside under Rule 60(b)(1). For, argues Respondent, if every mistake can be characterized as "any other reason justifying relief from the operation of the judgment," then every motion to set aside a judgment will be made under Rule 60(b)(7), and the three-month time limit will have no force or meaning. However, the converse argument can also be made: If every "negligence" or impropriety of an attorney is characterized as "negligence" within the meaning of Rule 60(b)(1), there can be no wrong perpetrated by a lawyer against his client that will ever amount to "any other reason justifying relief from the operation of the judgment." Thus, Rule 60(b)(7) will have little, if any, force or meaning.

Appellant argues that there must be a middle ground; there must be a principal of differentiation between the "negligence" or "mistake" treated under Rule 60(b)(1) and the "negligence" that might be treated under Rule 60(b)(7) as "any other reason justifying relief from the operation of the judgment."

The point of differentiation turns upon the notice to the judgment debtor that he is, in fact, a judgment debtor. For the three-month rule to operate fairly, the judgment debtor should either have knowledge of or have no good cause for failing to know of the judgment entered against him. A party can be said to either know of or have no good cause for failing to know of a judgment entered against him in a situation

where he either chooses to represent himself or when he chooses to retain an attorney who is actively representing him. A judgment entered against such a person should not be set aside beyond the three-month limitation which applies to Rule 60(b)(1) because such a judgment debtor or his attorney should have notice of any judgment entered against him. Even if such a judgment were entered against him because his attorney plead the wrong defenses, missed filing deadlines or otherwise mishandled the case, the judgment should stand unless set aside for good cause on a motion made within three months under Rule 60(b)(1). The reason for this is that the "negligence" involved in pleading wrong defenses, missing deadlines, or otherwise mishandling the case amounts to "negligence" committed during the representation of a client. Such negligence ought to be imputable to the client becuase it is a risk which every client assumes in hiring an attorney, or in the alternative, in representing himself. But the "negligence" that results in an attorney's abandonment of a client's cause is another matter. This latter type is not "negligence" committed during the representation of a client's cause. It is "negligence" resulting from the failure of an attorney to represent his client at all. It amounts to the abandonment of a client, to the unofficial withdrawal of the attorney, to the failure of an attorney to

actively pursue his client's cause of action or defenses. This type of "negligence" should not be imputed to the client because the client, at the time he hires his attorney, does not assume the risk of abandonment although he may assume the risk of poor representation.

This distinction makes sense in light of the time limits of Rule 60(b). A Rule 60(b)(1) motion must be made within three months. This is fair because, when actively represented, a client will within that period either know about the judgment entered against him or will have no good reason for not knowing about it. But a client who has been abanonded may very well not know the status of his case; he may even believe that his attorney has been zealously representing him, when, on the contrary, he has been abandoned, a judgment may already have been entered against him, and the three-month time limit of Rule 60(b)(1) may have already run out.

The only problem with this analysis arises when an attorney misses a filing or discovery deadline during the representation of his client. In other words, in a situation where an attorney, has NOT abandoned his client, but has failed to answer a pleading and a default is entered as a result, the party injured by that attorney's "negligence" could theoretically claim "abandonment" under Rule 60(b)(7). Thus, any failure by an attorney to meet a pleading deadline or to appear at a hearing could be deemed an "abandonment." The effect of

this would be to destroy the distinction between the Rule 60(b)(1) "negligence" committed during representation and Rule 60(b)(7) "negligence" resulting from the true abandonment by an attorney of his client's case. For this reason, any party claiming "abandonment" under Rule 60(b)(7) must be required to make a showing that the attorney's "negligence" is not simply a mistake made during representation, but that it constitutes an aggrevated pattern of attorney impropriety amounting to an unofficial withdrawal from the case and an abandonment of the client's cause.

In this present case, Swapp's former attorney's failure to represent Swapp did not amount to the missing of one or two pleading deadlines or a hearing, or to mistakes made during the representation of Swapp. It constituted an aggrevated pattern of impropriety amounting to the abandonment of a client: Swapp's former attorney failed to notify his client of discovery requirements, of depositions, of a stipulation for further discovery, of a motion to compel, of a motion to strike, of a default certificate and finally of the default judgment. The record also shows that Swapp's former attorney made no attempt to set aside the default of his client. These acts

and omissions do not constitute "negligence" committed during the representation of a client, but to an an unofficial withdrawal from this case and an abandonment of Swapp's claims and defenses.

The distinction which the appellant asserts here is not without foundation in law. A number of courts have treated the abandonment of a client or the unofficial withdrawal by an attorney as "any other reason justifying relief from the operation of a judgment" under Rule 60(b)(7). The leading case, Buckert vs. Briggs, 15 Cal. App. 3rd 296, 93 Cal. Rptr. 61 (1971), was cited in crossclaimant-appellant Swapp's Appeal Brief (pages 9 and 12).

The leading case in the Utah jurisdiction is Interstate Excavating v. Agla Development , 611 P.2d. 396 (Ut 1980), cited on page 11 of Swapp's Appeal Brief.

Furthermore, the cases which the Respondent has cited in its answering brief also demonstrate both the legality and propriety of distinguishing between "negligence" committed during the course of legal representation under Rule 60(b)(1) from the "negligence" resulting from abandonment or unofficial withdrawal by an attorney, constituting "any other reason justifying relief from the operation of the judgment," under Rule 60(b)(7):

1. For example, in Nederlandsche Handel - Maatschappij N.M. v. Jay Emm, Inc., 301 F. 2d. 114 (2d Cir. 1962), the negligence did not amount to abandonment or unofficial withdrawal, but was

the kind of excusable negligence attorneys sometimes commit in their profession and which is imputable to their clients. The time limit of Rule 60(b)(1) should and did apply in this case. The client need not consent to all an attorney does for him to be bound by what that attorney does. Because a client pays his attorney to act for him, the client is bound by his attorneys acts on his behalf. BUt a client does not hire an attorney to abandon him. Therefore, a client cannot be responsible for the unofficial withdrawal of his attorney (especially if he is unaware of it).

2. In the case of Golan v. Central Intelligence Agency, 607 F. 339 (D.C. Cir. 1978), the Court included dicta stating that there must be "extraordinary" circumstances to obtain relief under Federal Rule 60(b)(6) (which is comparable to Utah Rule 60(b)(7)). Those "extraordinary" circumstances exist in this case where Swapp was virtually abandoned by his attorney and where the "negligence" involved was not the "excusable" or even "inexcusable" negligence committed by an attorney actively forwarding his client's case.

3. In the case of Pitts v. McClaughlin, 567 P.2d. 171 (Ut. 1977), the trial court denied a Motion for relief from a Summary Judgment, and on appeal the Supreme Court of Utah affirmed the judgment of the trial court. But the Supreme Court stated categorically that "we express no opinion as to the rights of plaintiffs and defendants and third parties in any other litigation, but are convinced that Rule 60(b)(1)

is dispositive here, and that the circumstances prevailing in the instant case are not subject for relief under 60(b)(7)." Thus, this case, because it is one that turns upon certain peculiar and specific facts, cannot be used as precedent. It is clear, however, from the language of the opinion that in order for Rule 60(b)(7) to take affect, something other than "mistake" or "inadvertance" must be asserted as grounds. Mere "inadvertance" alone will not serve as "any other reason justifying relief from the operation of the judgment." It is Swapp's contention that, in his case, those "extraordinary" and independent grounds exist.

4. Similarly, in the case of Serzysko v. Chase Manhatten Bank, 461 F. 699 (2d Cir. 1972), the decision of the Court not to apply Rules 60(b)(6) of the Federal Rules of Civil Procedure (which are virtually identical to the provisions of Rule 60(b)(7) of the Utah Rules of Civil Procedure), turned upon the particular facts of that case. There the party seeking relief from the judgment made its Motion to Set Aside after the expiration of the one-year time limit set by the Federal Rules (which is comparable to the three-month time limit in the Utah Rules). However, the Court determined that the facts of the case did not rise to the level of "a fraud upon the Court" which would invoke the residual clause of Rule 60(b)(6) thus obviating the need to comply with the one-year time limit. This is another case that turns upon

facts different from those in the Swapp case.

5. In the case of Southern Bond Company v. Teel, 550 P.2d. 571 (Okl. 1976), the Court affirmed the decision of the trial court denying defendant's Motion for relief from the Judgment. But in that case, the Court specifically noted that the attorney's failure to appear on behalf of his client was not due to attorney "abandonment." The Court stated:

> "There is no allegation in the petition to affect Woolsey's attorney had abandoned him. . . . . Generally attorney's ignorance, or mistake, or apprehension not occasioned by adverse party, does not constitute grounds for vacating a judgment . . . . . An attorney's negligence while representing client is imputable to the client as negligence and does not constitute Unavoidable casualty and misfortune" justifying vacation of judgment under statute."

Although the Court here denied the Motion to Set Aside, it suggested very clearly that its grounds for so doing were that the defendant's attorneys "negligence" was committed during the representation of his client, as opposed to the "negligence" resulting from client abandonment or unofficial withdrawal.

6. In Stafford v. Dickison, 374 P.2d. 665 (Ha. 1962), a defendant was defaulted and judgment entered against him for failure to appear at a pretrial. The trial court ordered:

> Under the circumstances default judgment will be entered to take effect thirty days from this day during which period the defendant shall have

> the opportunity to move to have it set aside. Otherwise, it will become final. Defendant will be served with a copy of this Minute Order at the aforementioned address.

Defendant did not move to set aside. Shortly thereafter the plaintiff moved for the entry of the default judgment. No notice ever reached the defendant of this judgment. Eventually after the defendant learned of the judgment against him, he moved to set it aside. His Motion was denied, and an appeal was taken to the Supreme Court of Hawaii. That Court stated that the turning point of the entire case was whether or not the defendant ever received a copy of the Minute Order requiring him to set aside the judgment within thirty days. The Court concluded that the defendant had not been served with a Minute Order as directed and that, therefore, the defendant had been denied the opportunity to defend himself. Furthermore, the Court stated:

> Though an attorney be warranted in withdrawing, he should do so on reasonable notice to the client, allowing him time to employ another lawyer. . . . . the withdrawing attorney did not state in his withdrawing papers that he had notified his client of his withdrawal and according to the statement attributed to him in the minutes of December 15, 1958, he neither had done nor attempted to do so.

As a result of this fact, the Supreme Court concluded:

> In the present record, the case is one in which the Court allowed counsel for the defendant to withdraw on the day of pretrial knowing that the

> defendant had left the state and had not been notified of the hearing or of the withdrawal of his counsel, and intending the defendant be defaulted for the nonattention to the case resulting from the withdrawal so permitted. Though the Court contemplated that service of the Minute Order would save the defendant's right to defend, the Order was not served as now appears. There was nothing in the record showing service of the Minute Order of December 15, 1958, as directed. Upon the argument in this Court, plaintiff's attorney stated that he did not send defendant a copy and argued that the Clerk was descended. As whether the Court should presume that the Clerk sent it, plaintiff's attorney made no such contention.

Furthermore, the Court stated that in this case the defendant had made his Motion to Set Aside the Judgment under Federal Rule 60(b)(6) within a reasonable time and that the one-year limitation did not apply under the circumstances. If anything is to be gleaned from this case it is that attorney withdrawal, even with the permission of the Court, but without notice to his client, deprives the client of an opportunity to defend himself and that a motion to set aside a judgment made within a reasonable time, even if beyond the one-year time limit in the rule, will be granted in the interest of justice.

7. In Tahoe Village Realty v. DeSmet, 590 P.2d. 1158 (Nev. 1979), a number of factual matters exist that distinguish that case from the Swapp case before this Court. In De Smet the Appellate Court affirmed the trial court's denial of relief from the Default Judgment. However, in that case the pleading which the withdrawing attorney failed to file was not a dis-

covery pleading, but a responsive pleading. Furthermore, in making their Motion to Set Aside the Default Judgment, the defendants did not assert that their failure to respond resulted from the mistake, inadvertance, surprise, or excusable neglect on the part of counsel. Moreover, they also failed to set out a meritorious defense to the plaintiff's claim for fraud, which was required under the Rules of Nevada. The Court as a result of these factors, which are very different from the facts of the case before this Court, held that "the grounds for setting aside a default judgment were not met and that the District Court did not abuse its disgression by refusing to set it aside." Again the opinion of the Appellate Court turns upon specific facts which are very different from the facts in the present case.

8. Finally, in Williams v. Five Platters, Inc., 510 F. 2d 963 (United States Court of Customs and Patent Appeals, 1975), the Court affirmed the Order Denying Relief from a Default Judgment. But in that case, the appellant argued that his failure to file a brief in answer to the Motion for Summary Judgment was, as set forth in the Affidavit of his attorney, due to the attorney's absence from his office, pressure of other work in the attorney's office, omission of the matter from the attorney's docket, and inability of the attorney to contact his client. The Court determined:

> The reasons given by counsel are such as to evidenced neglect, but not excusable neglect. Absence from one's office and pressure of work are common phenomena. Lawyers who sit constantly in their offices with little to do are unlikely to be dealing with Rule 60(b)(1). No reason was offered in justification for omitting the matter from the attorney's docket. The alleged 'inability' to contact Williams rested on one letter which went unanswered. If Williams was a traveling entertainer who left no forwarding addresses, that fact only serves to indicate Williams personal neglect of the matter. Counsel's neglect of duty is not per se, excusable neglect sufficient to entitle Williams to a fourth day in Court under Rule 60(b)(1). Nor is ignorance of due dates. . . . . There is, however, on this record, no fraud to be condoned. Though Williams twice alleges fraud and was provided two opportunities to prove it, he declined to do so.

This decision, too, rests upon circumstances very different from those in the Swapp case. Here there were no allegations of attorney abandonment. Moreover, the defendant there had apparently had three previous opportunities to make his case in Court, and the Court in forming the denial from relief of judgment was simply refusing to Williams his "fourth day in Court."

CONCLUSIONS

Thus, as a view of the cases cited by crossclaimant-responden Tanglewood indicate, Courts will not grant relief from a default and default judgment unless there is a showing of something more than attorney "mistake" and "inadvertance." And it is precisely that showing that crossclaimant-appellant Swapp has made on the record before this Court.

Because the impropriety of Swapp's former attorney constituted the "extraordinary" circumstances of "abandonment" and "unofficial withdrawal," Swapp was denied an opportunity to defend himself in the proceedings before the trial court. However, as soon as he was apprised of the fact that he had been abandoned, Swapp obtained new counsel and made his Motion to Set Aside the Default Judgment against him under Ruly 60(b)(7), on grounds that the abandonment he had suffered by his attorney constituted, not "mistake, inadvertance, surprise or excusable neglect," but "other reasons justifying relief from the operation of the judgment" allowing him, therefore, to bring his Motion To Set Aside beyond the three-month time limit, within a reasonable time.

For the reasons stated herein and in the crossclaimant-appellant's Appeal Brief, Reid Swapp seeks from this Court relief from the Default and the Default Judgment filed against him, as well as relief from the Execution predicated thereon.

DATED this 23rd day of April, 1982.

JACKMAN & ASSOCIATES

PAUL JAMES TOSCANO
Attorneys for Crossclaimant-
Reid Swapp aka Reid Swapp
Swapp Construction Co.

MAILING CERTIFICATE

MAILED a true and correct copy of the foregoing to:

Patricia M. Leath
John A. Snow
Van Cott, Bagley, Cornwall & McCarthy
Suite 1600, 50 South Main Street
Salt Lake City, Uta 84144

Attorneys for Tanglewood SLC
Associates, Ltd.,
Crossclaimant-Respondent.

postage prepaid this ____ day of April, 1982.

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